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 7

8 IN THE UNITED STATES DISTRICT COURT  
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 10

11 UNITED STATES OF AMERICA,	)	No. CR 07-0764 SI
	)	
12 Plaintiff,	)	DEFENDANT'S REPLY TO
	)	GOVERNMENT'S
13 v.	)	SENTENCING
	)	MEMORANDUM
14 JUAN HERRERA-SANTOS,	)	
	)	
15 Defendant.	)	<b>Hearing Date:</b> Friday, July 25,
	)	2008 at 11:00 a.m.

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18 **Introduction**  
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20 Mr. Herrera-Santos has Sureño tattoos. This fact has cost him a fast-track offer  
 21 with a four-level reduction from the government, and now has the government seeking  
 22 obstruction charges. These are not just results for a man who is not an active Sureño  
 23 member, who has never been arrested in gang activity or with gang members, who has  
 24 never had a gun or a violent offense characteristic of the Sureño gang.

25 If the Court is inclined to adopt the government's view that the Sureño issue is the  
 26 pivotal question in this routine illegal reentry case, the defense requests an evidentiary  
 27 hearing on the question. A far better course, however, is to focus on what is *known* about  
 28 this defendant: he is a petty, street-level dealer who sells \$20 rocks to support his own

1 habit. The sixty-four month sentence urged by the government is not appropriate for this  
 2 man, and does not comport with the factors of 18 USC § 3553(a).

3 **I. If “Active” Gang Membership is a Material Fact, an Evidentiary Hearing is**  
 4 **Requested**

5 Briefing on the Sureño gang issue will not resolve a dispute that the government  
 6 urges is central to this illegal reentry sentencing. This gang issue has been a persistent  
 7 problem in the case, with it first rising in the context of objections to the presentence  
 8 report. As the Probation Officer correctly observed in response to defense objections:

9 Although the police report indicates that the defendant was in the Sureño territory,  
 10 characterized by Hyde Street in the Tenderloin District of San Francisco, blue is  
 11 the color associated with Sureño gang members, and their form of display is  
 12 wearing a blue belt with the end dangling, there is no concrete evidence that the  
 13 defendant was acting *on behalf* of the Sureño when he was arrested. Although  
 14 Herrera-Santos was noted to have worn a belt in the fashion displayed by Sureños,  
 15 the police report indicates that it was only at the booking stage of the defendant’s  
 16 arrest that he was noticed to have Sureño tattoos. San Francisco, California Police  
 17 Department Gang Unit Task Force’s (SFPD GUTF) also indicated *there were no*  
 18 *gang allegations in the arrests made by their agency*, but the defendant is an  
 19 identified gang member.

20 *PSR Objections* at 2 (emphasis added).

21 The defense specifically requested discovery during the presentence process of any  
 22 field identification cards, informant interviews, or other evidence identifying Mr. Herrera-  
 23 Santos as an active Sureño member. Nothing has been produced to date. Instead, the  
 24 government has relied on a declaration of an officer who opines that the defendant is an  
 25 active member – without any supporting arrest reports, informant interviews, or  
 26 photographs of Mr. Herrera-Santos associating with active Sureño members. *See Decl.*  
 27 *Sgt. Dien Ries* (captioned “King Decl. Supp. United States’ Sent. Mem.”)

28 It is not disputed that Mr. Herrera-Santos is burdened with Sureño tattoos (which  
 he seeks to have removed). It is not disputed that the defendant has been a Sureño  
 member. The only question is whether this \$20 rock dealer – who has never been armed  
 or arrested in gang activity – is now an “active” Sureño gang member. If the Court feels

1 that this issue is a material fact that bears upon the sentencing analysis, the defense would  
 2 request a continuance of sentencing, full discovery of all material upon which the  
 3 Probation Office and the government are apparently relying to make their assertions, and  
 4 an evidentiary hearing. *See Irizarry v. United States*, 128 S. Ct. 2198, 2203 (2008)  
 5 (“Sound practice dictates that judges in all cases should make sure that the information  
 6 provided to the parties in advance of the hearing, and in the hearing itself, has given them  
 7 an adequate opportunity to confront and debate the relevant issues.”)

## 8 **II. *Sanchez-Rodriguez* Survives Amendments to Section 2L2.1**

9 In its Reply, the government argues that the Sentencing Commission has  
 10 effectively overruled the Ninth Circuit’s *en banc* decision in *United States v. Sanchez-*  
 11 *Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (*en banc*). *See Gov’t Reply* at 4:3-5 (*Sanchez-*  
 12 *Rodriguez* is no relevant because it was decided before the 2001 amendment to USSG §  
 13 2L1.2(b)(1)). The government is wrong on several counts.

14 First, the government relies on an unpublished decision in support of its argument.  
 15 *See id.* at 4:3-5 (citing *United States v. Montenegro-Samaniego*, 108 Fed. App’x. 492,  
 16 493 n.2 (9th Cir. 2004)). Under Ninth Circuit Rule 36-3, “Unpublished dispositions and  
 17 orders of [the Ninth Circuit] are not precedent, except when relevant under the doctrine of  
 18 law of the case or rules of claim preclusion or issue preclusion.” Ninth Cir. Rule App.  
 19 Proc. 36-3(a).

20 Moreover, Ninth Circuit rules expressly preclude did citation of unpublished  
 21 decisions issued before January 1, 2007 in any court:

22 (c) Citation of Unpublished Dispositions and Orders Issued before January 1,  
 23 2007. Unpublished dispositions and orders of this Court issued before January 1,  
 24 2007 may not be cited to the courts of this circuit, except in the following  
 circumstances.

25 (i) They may be cited to this Court or to or by any other court in this circuit  
 26 when relevant under the doctrine of law of the case or rules of claim  
 27 preclusion or issue preclusion.

28 (ii) They may be cited to this Court or by any other court in this circuit for

1 factual purposes, such as to show double jeopardy, sanctionable conduct,  
2 notice, entitlement to attorneys' fees, or the existence of a related case.

3 (iii) They may be cited to this Court in a request to publish a disposition or  
4 order made pursuant to Circuit Rule 36-4, or in a petition for panel  
5 rehearing or rehearing en banc, in order to demonstrate the existence of a  
6 conflict among opinions, dispositions, or orders.

7 *Id.* at 36-3(c)(i) - (iii). The 2004, unpublished *Montenegro-Samaniego* decision falls in  
8 none of these exceptions, and the defense accordingly objects to the government's  
9 reliance on this decision in its brief.

10 The *Montenegro-Samaniego* memorandum disposition is also rendered moot by  
11 *Booker*. *Montenegro-Samaniego* did not deal with a departure from the twelve-offense  
12 level specific offense adjustment at issue in the present case (and that came into play after  
13 the 2001 amendment). 108 Fed. Appx. 492. Instead, it held that a sixteen-level specific  
14 offense adjustment for kidnapping was "mandatory." *Id.* at 493. Of course, the concept of  
15 "mandatory" guidelines is a quaint anachronism after the Supreme Court's 2005 decision  
16 in *Booker* – a decision that came after the 2004 *Montenegro-Samaniego* case and that  
17 rendered that memorandum disposition moot. *See United States v. Booker*, 543 U.S. 220,  
18 265 (2005) (finding Sixth Amendment violation with mandatory guidelines and excising  
19 statutory provisions that require mandatory guidelines).

20 Assuming without conceding, however, that the Sentencing Commission has  
21 cabined an *en banc* court of the Ninth Circuit, the issue is purely academic in any event.  
22 The below-guideline sentence urged by the defense is equally appropriate as a variance  
23 under Section 3553(a).

24 In a 2008 case, another *en banc* Court of the Ninth Circuit issued what was clearly  
25 intended as the lead "primer" on Section 3553(a) sentencing in the Ninth Circuit. *United*  
26 *States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (*en banc*). In *Carty*, the Court explained the  
27 primary goal of the federal sentencing court after *Booker*, *Rita*, and *Kimbrough*:  
28

1 The overarching statutory charge for a district court is to “impose a sentence  
 2 sufficient, but not greater than necessary” to reflect the seriousness of the offense,  
 3 promote respect for the law, and provide just punishment; to afford adequate  
 4 deterrence; to protect the public; and to provide the defendant with needed  
 educational or vocational training, medical care, or other correctional treatment. 18  
 U.S.C. § 3553(a) and (a)(2).

5 *Carty*, 520 F.3d at 991.

6 The sentence that is “sufficient, but not greater than necessary” given the unique  
 7 facts of this case is a below-guideline custodial term. The first factor in the Section  
 8 3553(a) analysis is “(1) the nature and circumstances of the offense and the history and  
 9 characteristics of the defendant.” *See* 18 USC § 3553(a)(1). That is precisely the core  
 10 analysis that was at issue in *Sanchez-Rodriguez*, and is the core question for the  
 11 sentencing now before this Court. The nature and circumstances of this illegal reentry  
 12 offense, and the history of an addicted, \$20 street dealer who spent his youth homeless on  
 13 the streets of Tijuana, do not mandate the sixty-four month sentence urged by the  
 14 government. A below-guideline sentence is instead appropriate.

### 15 **III. The Court Should Consider the Refusal to Give the RDAP Reduction to Alien** 16 **Inmates as Part of the Section 3553(a) Analysis**

17 In its Reply, the government recommends that the defendant should wait to request  
 18 relief for completion of the RDAP program until “(1) he is housed at a facility that has the  
 19 RDAP, (2) he signs up for the program, and (3) he completes the first phrase of the  
 20 program.” *Gov’t Reply* at 8:3-5. With admirable candor, the government then opines,  
 21 “Even then . . . a court should deny his request.” *Id.* at 8:5-6. The logic of the  
 22 government’s argument perfectly mirrors that of the Bureau of Prisons, which  
 23 incarcerates alien addicts, does not provide incentives for drug treatment programs, and  
 24 may not accept Mr. Herrera-Santos into drug treatment.

25 The government has not, and indeed, cannot, cite any case that precludes the  
 26 Bureau of Prison’s treatment of its prisoners as a valid consideration in the Section  
 27 3553(a) analysis. In fact, to fail to include this issue in the sentencing analysis would be  
 28

1 directly contrary to the sentencing statute, which directs this Court to consider “the need  
2 for the sentence imposed – to provide the defendant with needed educational or  
3 vocational training, medical care, or other correctional treatment in the most effective  
4 manner.” 18 USC § 3553(a)(2)(D). Ordering the Bureau of Prisons to permit Mr. Herrera-  
5 Santos to participate in the RDAP program, and reducing his sentence in light of his  
6 voluntary pursuit of treatment, achieves the goal of Section 3553(a)(2)(D) of providing  
7 “correctional treatment in the most effective manner.” *Id.*

8         One of the many benefits of the *Booker* decision is that it allows for “bottom-line”  
9 sentencing: common sense, reasonable sentences that best match the particular offender  
10 and offense. In this case, society’s main concern with Mr. Herrera-Santos is not that he  
11 has gang tattoos, or even that he has been deported and reenters. The bottom-line in this  
12 case is Mr. Herrera-Santos’s addiction – and the petty drug sales used to fuel that  
13 addiction – that are the root of *all* of the criminal conduct. The sixty-four month sentence  
14 urged by the government will do nothing to discourage recidivism in this case if the  
15 underlying addiction problem is not finally addressed. The best way to address that  
16 problem is a below-guideline sentence, a very strong RDAP recommendation, and  
17 incentives incorporated in the sentencing in light of the Bureau of Prison’s exclusion of  
18 alien addicts from the program’s benefits.

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**Conclusion**

For the foregoing reasons, the defense respectfully requests that the Court depart and/or adopt a variance from the guideline range, and impose a sentence of twenty-four months of custody with supervised release to follow.

Dated: July 23, 2008

Respectfully submitted,

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/s

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